

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
HESS, et al., : Docket #21cv4099
 : 1:21-cv-04099-AT-RWL
 :
 Plaintiffs, :
 :
 - against - : New York, New York
 : May 12, 2022
 BED BATH & BEYOND, INC., :
 :
 Defendant. :
 :
 ----- : PRE-MOTION CONFERENCE

PROCEEDINGS BEFORE
HONORABLE ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;
Transcript produced by transcription service.

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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HONORABLE ROBERT W. LEHRBURGER (THE COURT):

Good afternoon, it's Judge Lehrburger in Hess versus Bed Bath & Beyond, 21cv4099. Counsel, please put in your appearances starting with plaintiff.

MR. STEVEN MOSER: Steven Moser for the plaintiffs, good afternoon.

THE COURT: Good afternoon. For the defense?

MR. JEFFREY RUZAL: For defense, Jeff Ruzal joined by Matt Aibel and Tammy Tran who's a new associate who joined the firm who's observing but not, has not entered an appearance in the Court, if that's okay with Your Honor and plaintiffs' counsel.

THE COURT: Absolutely fine, of course. So we're having this conference in light of the plaintiffs' desire to file a third amended complaint and the defendant's opposition and how this should be dealt with including with respect to a motion to amend and/or a motion to dismiss. I guess I want to start by asking of anything has changed in any way, let me ask Mr. Moser in that regard?

MR. MOSER: Not since we wrote the letters to the Court, nothing has changed.

THE COURT: All right. So, Mr. Ruzal, the Court obviously would prefer and think it best not to have two

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2 sets of motions. And at least insofar as there is a
3 concern about adequacy of page limits, I don't envision a
4 problem in that regard because to the extent you would
5 need additional pages because of these issues I have no
6 problem suggesting to Judge Torres that she allow that.
7 But that's sort of the tail wagging the dog, we should
8 talk about some of these issues, obviously.

9 And I understand, sort of boiling down your
10 concerns, you are correct that if you want to argue bad
11 faith and prejudice, that is more apt on a basis of a
12 motion to amend than it is on the motion to dismiss. I
13 have to say though, I'm not really seeing how this adds
14 up to bad faith that would preclude amendment but maybe
15 you can expand on that as well at the appropriate
16 juncture.

17 There are three aspects that I understand that
18 the amended pleading seeks to accomplish, one is to add
19 representative plaintiffs, the other is expand the class
20 and the other is to add the hiring notice claim. And let
21 me just, again, so I can understand the scope of things,
22 as to adding the representative plaintiffs, does that go
23 hand-in-hand, Mr. Moser, with the expanded class? In
24 other words, are they each representative of a different
25 position?

MR. MOSER: No, there are so many diverse positions that getting a representative from each position would mean that we have 20 plus class representatives. And what we are getting in terms of information from class members is that the actual title is not that relevant because regardless of job title they were all manual workers, they were cross trained, for instance, you know, a stock associate could be asked to work the register and a cashier could be asked to help stock merchandise at the end of the day. And so we don't have a representative from each, from each category. We could provide that but I think it would just be overly complex, and so that's why we didn't do that.

THE COURT: Okay, but I just want to understand the nature then of the additional representative plaintiff that you seek, is it simply that you have located them or are they serving a particular purpose?

MR. MOSER: Well some of them are serving a different purpose, some of them are cashiers, for instance, some of them are assistant managers, so they do add some additional job categories and we wanted to, in light of, you know, challenges to the representative plaintiffs we wanted to add them as well just so that we're covered in case, you know, one of the

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2 representatives gets disqualified.

3 THE COURT: I see. I see. And in terms of the,
4 your desire to expand the class, if I'm reading your
5 papers correctly that's based on the third party
6 discovery you've obtained regarding workers comp, is that
7 correct?

8 MR. MOSER: That was where it originated and
9 since that date we have spoken with numerous class
10 members who have confirmed what we see in those records,
11 that's correct.

12 THE COURT: Well, so those records, if I
13 understand them, may indicate that an accident occurred
14 while someone was engaged, what would be classified as
15 physical labor, but I assume they give new clue as to how
16 much of their function and time during the day is spent
17 doing physical labor activities, is that fair?

18 MR. MOSER: That's correct.

19 THE COURT: All right, so I'm not sure that
20 really they're that probative of anything in terms of the
21 information that would be needed to make a determination
22 about whether, in fact, they would qualify. And I have
23 to say I'm a little suspect of, you know, if that's what
24 you got, then I'm not sure that's really going to provide
25 much of a basis unless you can convince the Court

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2 otherwise. What's your thought about that?

3 MR. MOSER: Yes, so the defendant's position has
4 been that someone like a manager is doing managing, is
5 not doing managing, is not physical work. And as you can
6 see from some of the things that we furnished the Court,
7 managers and supervisors account for, you know, 28
8 percent of the total injuries at the stores. So we, we
9 believe that while the workers compensation records don't
10 end the story and don't grant the plaintiffs some type of
11 entitlement to summary judgment, they are to some extent
12 probative and we are getting information from the class,
13 as well, that really substantiates the position that we
14 have in the third amended complaint.

15 THE COURT: And what is the, just remind me, the
16 percentage of time to be a physical worker, is it 25
17 percent?

18 MR. MOSER: Correct.

19 THE COURT: All right. All right, Mr. Ruzal,
20 why don't you tell me how you think it would be best to
21 proceed (inaudible) from your perspective, because the
22 plaintiff wants to amend and there's the obvious
23 questions about analyzing this under the motion to amend
24 standard, but there certainly is your motion to dismiss
25 that's outstanding and that may be modified to add some

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of these additional issues. So why don't you help me understand how we're going to do this most efficiently.

MR. RUZAL: So thank you, Your Honor. So, first off, yes, there is overlap with respect to the futility for purposes of us opposing a motion to amend which overlaps to some degree with respect to the arguments we would be making in a motion to dismiss if Mr. Moser's third amended complaint is permitted, though we believe the underlying bad faith, prejudice, undue delay and further amending really, in and of itself, saves the day for defendant and really should preclude plaintiff from being able to further amend.

And I'm happy to discuss that in a bit more detail but before doing so, if I could just speak to a point that Mr. Moser had raised with respect to these new plaintiffs and the various purported positions that they served during the relevant period, and just comment that while Mr. Moser is suggesting that it doesn't necessarily matter what their position was because they all, quote, "cross-trained and were all manual workers," there's been nothing adduced to suggest that, that's pure supposition. But then Mr. Moser goes on sort of in contradictory fashion and states that, well, in certain instances it does matter because certain people were cashiers or

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2 otherwise.

3 So it seems to suggest that it actually does
4 matter what the position is, which I agree with. I think
5 it absolutely does matter what the position is and there
6 are probably more than 100 different positions, unique
7 positions throughout the stores in New York State. And
8 for that reason alone we really do not believe it's fair
9 or adequate that the now eight, well the two named
10 plaintiffs and the eight proposed new named plaintiffs
11 are in any position to be able to move forward and
12 represent such a massive putative class.

13 THE COURT: Right, no, I understand. So -- so on
14 the bad faith, why don't you address that? I mean, look,
15 there is, you mentioned the solicitation of additional
16 class members in an ad that comport with ethical
17 guidelines. You know, I can't speak to whether that is or
18 is not so. I know that you have concerns about the use of
19 the trademark, fine, I understand that, too, but what,
20 I'm not sure I understand how the other things are bad
21 faith because it seems to me there are bids to amend
22 based on additional or new information, no?

23 MR. RUZAL: Understood, Your Honor, and a fair
24 question for sure. But it really falls within the
25 context of the fully story of what's gone on since the

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2 parties last appeared before Your Honor on November 30th,
3 okay. At that conference, Mr. Moser specifically stated
4 that at the time and from the time that the first
5 complaint had been filed, which was over a year ago,
6 okay, plaintiff believed that most of the other
7 classifications at the store level are manual workers,
8 okay, and that to be conservative, in his own words, that
9 they did not want to stretch outside the job, outside the
10 job categories of the individuals that plaintiffs or the
11 named plaintiffs represented. That's what, that's what
12 Mr. Moser represented when he was seeking to make his
13 second amended complaint solely to expand the temporal
14 limitations based on the tolling argument, okay.

15 Then from November 30th moving forward, okay,
16 Mr. Moser then went on to engage in and, again, I'll
17 characterize as, as these, these solicitations or
18 solicitation campaign based both on social media and
19 through text messages where he effectively attempted to
20 recruit individuals to become named plaintiffs or class
21 members in waiting through these misleading new styled
22 headlines without, in many instances, even labeling these
23 messages as attorney advertising, okay. This is not based
24 on information that Mr. Moser received from the Workers
25 Compensation Board, this is all based, and it's not based

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2 on bona fide discovery, it's rather based on these
3 improper solicitations and upon, I'm sure, speaking with
4 these additional proposed plaintiffs, decided to proceed
5 with a, a New York Labor Law 195.1 wage notice claim. And
6 interestingly, I'll add that in no way can a 195.1 claim
7 be informed by the worker compensation documents that
8 were provided to Mr. Moser through subpoena.

9 So it's all very suspect to us and the delay in
10 question from when this complaint was first filed is so
11 attenuated that there really should be no basis for Mr.
12 Moser to proceed with the further amendment now.

13 THE COURT: And remind me, when was the first
14 complaint filed?

15 MR. RUZAL: I believe it was May 10th of last
16 year, Your Honor.

17 THE COURT: Right, okay. All right, Mr. Moser,
18 I'm sorry -- yes, Mr. Moser, do you want to speak to
19 those issues, the delay and the solicitation?

20 MR. MOSER: Yes, thank you, I would. It has
21 been three months since the defendants received our
22 randomized sample, a sample discovery that the Court
23 instructed should happen and we haven't received a single
24 document. It has been ten months since we served
25 interrogatories and document requests on Bed Bath &

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2 Beyond, we have not received a single document that is
3 unique to either a named plaintiff or a class member.
4 They have exchanged 336 pages of what is primarily an
5 employment handbook which is not relevant at all, and
6 some documents from the Department of Labor which show
7 that Bed Bath & Beyond knew about the requirement to pay
8 manual workers as far back as the 1990s.

9 But other than that, the defendants have given
10 us nothing. So for them to suggest that there's some kind
11 of bad faith here when they have intentionally not
12 produced any records which would help us, I think it just
13 doesn't sound like, to me it's not fair that a defendant
14 refuses to engage in discovery and then uses that refusal
15 as the basis for challenging the plaintiffs' position
16 that new information obtained from other sources
17 justifies amending the complaint.

18 MR. RUZAL: Your Honor, if I may be hear on that
19 point?

20 THE COURT: Yes, please.

21 MR. RUZAL: Thank you very much. Look, I'll say
22 this, you know, respectfully, I think that's a
23 mischaracterization of what's happened in the past few
24 months. To be clear, well, a few things. First off,
25 defendants have been endeavoring to capture what are, in

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2 fact, paper files scattered across the stores of New York
3 State in order to consolidate them, digitize them and get
4 them to us in order so that we can furnish them to Mr.
5 Moser. So we have been moving forward in good faith to
6 try to produce this discovery.

7 To be clear, on February 6th plaintiffs first
8 informed defendants intend to amend the complaint. Then
9 on February 9th plaintiffs provided a class list, okay. So
10 this is not where it's been languishing for so long.
11 Furthermore, it's, for Mr. Moser to sort of place this on
12 defendants squarely for purposes of discovery is not
13 entirely accurate, okay. We've engaged Mr. Moser in
14 various meet and confers to which he never responded.
15 Mr. Moser was supposed to serve requests for admissions
16 for the sample class, we never received them. There was
17 actually no meet and confer, whatsoever, or dialog from
18 Mr. Moser's perspective with respect to discovery in
19 these intervening months. And, instead, we've been, we've
20 been hearing about individuals who are being solicited to
21 try to move forward with respect to being recruited for
22 this lawsuit which is not moving forward with discovery
23 but rather shirking discovery on his end and rather going
24 in on a solicitation campaign to try to increase the
25 class size.

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THE COURT: But why are your sample documents taking so long, I would have thought that would have not taken so long given where we were last time?

MR. RUZAL: The understanding, Your Honor, that I'm receiving from my client is, again, that it's incredibly cumbersome to pull the files that reside only at the store level to be able to get them to a central location so that they can be copied because they're incapable of being copied at the local level, again, from what I understand from my client. And that why ever there has been a delay, I can't explain on a day by day basis but that it is taking an incredibly long time for them to get this done and -- (cross-talk)

THE COURT: I mean the fact is, you know, the sampling method and the extent that I approved was very reasonable and it does not take much at a store to pull the employee file on a particular few employees and perhaps talk to them about additional material. I would say that could all be able to be done in two weeks quite frankly, not three months and going.

So I, in terms of the delay issue, I don't think that's going to be a winner for you. I don't think the solicitation is going to be a winner. In terms of bad faith, in terms of necessarily preventing an amendment,

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that's not to say that if there really were ethical violations that something might have to be done about that, I'm not suggesting there were, but it's certainly not something that if it happened would be just overlooked. But it's just, it's not sounding like there's not much there there on that issue, but more so on the merits issue, that would be futility, for expanding the class.

So, again, I'm not, you know, I can't tell you that you're not going to, I can't prevent you from filing a motion that you want to file, again, I'm just trying to look for a way to avoid two sets of motions and make it more efficient for everyone concerned.

You know, I know there's the other issue of the hiring notices and I am curious, I want to make sure I understand something, Mr. Moser, you said, you indicated that, something about none of the documents or notices being signed and dated with written acknowledgement and then I understand the defendant to have said, well, wait, for one of these people, Tameka (phonetic), I'm forgetting her last name, we do have a signed copy. Can you speak to that, is that something that was simply errant or are you saying it's still not sufficient?

MR. MOSER: I am going to say that I could have

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2 stated it differently, so we don't believe that these
3 notices were actually furnished to the plaintiffs. Ms.
4 Jones does not recall receiving the notice. And with
5 regard to at least two of the plaintiffs, the notice was
6 signed months after employment started --

7 THE COURT: No, I understand that point.

8 MR. MOSER: So I think for us there's two
9 issues. There is the fact that Bed Bath & Beyond redid
10 New York State Department of Labor notice. The New York
11 State Department of Labor notice contains an
12 acknowledgment, in other words, when the employee signs
13 that, the employee is signing the acknowledgement that
14 they got a copy of it. And in this case there is no
15 acknowledgement. There's a signature on it in some cases,
16 but there is no acknowledgement that the employee
17 actually received it.

18 THE COURT: All right, so it's a question about
19 -- okay, I get that.

20 MR. RUZAL: Your Honor, can defendants just be
21 heard on that one point? What's concerning to us though
22 is, Your Honor, we furnished the wage notices to Mr.
23 Moser focusing on plaintiff Jones. I don't know how Mr.
24 Moser distinguishes a, quote, "acknowledgement" from the
25 signature, I don't know that there is --

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THE COURT: Whoa, whoa, whoa, but there's a signature and then there's, as he says, there's certain required language that is an express acknowledgement and you are basically attesting to the fact that, yes, I have received this and that's what it says. That is different than just signing a document, in the end it may not be a practical difference, it may just be a technical, technicality, but it may not be. But there is a distinction there, I understand the difference that was being made, and after I read the letters together I sort of thought that's what he might have had in mind than questioning whether there was an actual signature.

I have to say though, I am intrigued by the possibility of the defendant's argument that, about that certain, there are certain instances in these cases where standing is lacking because of, at least with respect to these penalty provisions, because of minor, what might be considered minor transgressions. But again, I haven't looked at all those cases and I have no idea if it would be applicable here. I certainly don't think that's going to be a basis to get past a futility argument, maybe a motion to dismiss argument, probably more likely summary judgment. But all this is to say, you know, the motion, again, I'm just trying to think about doing it

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2 efficiently, maybe there is no way.

3 And so, Mr. Ruzal, is it your thought that you
4 really do intend to pursue two sets of motions here, that
5 is the motion to amend -- I'm sorry, forcing the
6 plaintiff to file a motion to amend because you want to
7 challenge the amendment as opposed to just wait and do it
8 as part of a motion to dismiss?

9 MR. RUZAL: Yes, Your Honor, and just to be sure
10 that I understood Your Honor's last point about any
11 distinction between the standard for futility and a
12 motion to dismiss, to the extent that there is -- I'm
13 sorry, Your Honor?

14 THE COURT: They're the same standard.

15 MR. RUZAL: I misheard, I'm sorry, I thought, I
16 thought that you were indicating that it might not, it
17 might not pass muster with respect to futility but maybe
18 something different.

19 THE COURT: You are correct, I did suggest that
20 --

21 MR. RUZAL: Okay.

22 THE COURT: Even though it's a, the reason being
23 just at first blush of having looked at one or two of
24 those cases I think, and not having looked at it
25 particularly carefully or in depth in any way, it just

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2 seems to me it might be somewhat fact specific based on
3 the, you know, specifics of each case, what the
4 transgression is that's alleged (inaudible) et cetera,
5 but I don't know. Again, I'm not saying I know.

6 All right, so, look, Mr. Moser, I don't know
7 that there is really way around this, the defendants
8 really feel that they have bases to oppose the amendment.
9 I can't say in any way that, you know, it would be
10 frivolous to do so, maybe, again, a little inefficient
11 but it's certainly not frivolous so I can't tell them no,
12 don't do it. So I think we're going to have to go that
13 route unless you have some other suggestion.

14 MR. MOSER: No, I don't have another suggestion
15 but I will ask a question which I think I need, or raise
16 something which I think I need to research, and that is
17 if the defendants raise futility on a motion to amend, if
18 they can subsequently raise futility, again challenging
19 the same pleading on a motion to dismiss.

20 THE COURT: Right, failure to state a claim.
21 Yes, I don't know, good question. All right, but
22 regardless, it sounds like we're going to have to go
23 forward. So in terms of providing the defense with a
24 proposed third amended complaint, has that now been done
25 in terms of the official amendments that you propose?

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MR. MOSER: Yes, in light of some of the discussions that we've had today, I may make some minor wording changes to it, but it would be nothing substantive, it would be nothing that changes even the number of paragraphs, it would just clarify what we're saying.

THE COURT: Yes, well, then, okay, so everything needs to be geared off of that, so when can you provide that to the defense?

MR. MOSER: I can provide that by, I can provide that by Tuesday of next week.

THE COURT: All right, and, now let me ask the defendant, we could just have it that he would just, that the plaintiff would just go ahead and file a motion to amend attaching the proposed, final proposed third amended complaint, that might actually be a little bit more efficient way to do it. Why don't we do it that, do you have any objection to doing it that way?

MR. RUZAL: This is Jeff Ruzal for the defendant. No. No, Your Honor, so long as, and I assume that the Court doesn't want to hear further from the parties, you know, in the normal mechanics of Mr. Moser proposing it to defendants, us meeting and conferring and us getting back to the Court.

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2 THE COURT: Right, you've already, you've
3 already essentially done that.

4 MR. RUZAL: Of course, Your Honor, right.
5 Right, of course, and if it isn't a substantive change
6 then we agree that there would be no need to go through
7 that formality and we have no objection to Mr. Moser just
8 simply filing the further, I guess, the further amended
9 complaint --

10 THE COURT: The motion, he would file a motion
11 to amend. So my question then becomes to Mr. Moser, when
12 do you think you'd be able to file your motion to amend?

13 MR. MOSER: I'd like to move things along, I
14 could have that ready by the 27th.

15 THE COURT: All right, so if he files that on
16 the 27th, then how long do you think you need to respond,
17 Mr. Ruzal?

18 MR. RUZAL: Your Honor, I think, I mean would
19 30, would 30 days be too much, Your Honor, considering
20 what we expect to be a fairly comprehensive set of
21 papers?

22 THE COURT: Well, it's -- 30 days seems fine,
23 that's typical --

24 MR. RUZAL: Thank you.

25 THE COURT: Fairly typical. So that would bring

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it to June 26th and how long would you need for reply, Mr. Moser?

MR. MOSER: I would like three weeks for the reply.

THE COURT: Hold on.

MR. MOSER: Simply because the motion, itself, is, will not be able to address many of the issues that they raise in their opposition.

THE COURT: Well that's fair, that's true. All right, June 26th and -- oh, wait, hold on, that's a weekend. So I'm teeing off of May 27th, that's a Friday, the 26th is a Sunday, so the opposition will be due the 27th of June and then the reply would be the 18th of July, all right? So that's what we will do with that.

Anything else we need to discuss at the moment, Mr. Moser?

MR. MOSER: Not from the plaintiffs' perspective.

THE COURT: All right, and from defense, Mr. Ruzal?

MR. RUZAL: Nothing further, Your Honor, thank you.

THE COURT: All right, well --

MR. MOSER: My only, I just, I just have one

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2 question and I misspoke, I haven't heard when the
3 defendants are going to provide, you know, the sample
4 discovery and I'd rather not, you know, come back to the
5 Court with that as a separate motion, you know?

6 THE COURT: I think that's something you have to
7 meet and confer about but, Mr., Mr. Ruzal, when can you
8 have an answer on that?

9 MR. RUZAL: I will confer with my client and get
10 a better understanding of the time table and let them
11 know that the Court has expectations that this should
12 have been completed as quickly as possible.
13 Respectfully, I don't know that three weeks would have
14 been possible in any event but I'll be sure to convey to
15 them that this needs to be hurried along and I'll be sure
16 to get back to Mr. Moser as soon as that occurs which I
17 hope to be early next week.

18 THE COURT: Yes, and so I'm going to say that
19 you have to get back to Mr. Moser by Thursday of next
20 week with a firm date and we'll take it from there, all
21 right? All right, in the meantime, I wish you all good
22 health and we're adjourned. Thank you.

23 (Whereupon the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Hess, et al. versus Bed Bath & Beyond, Inc., Docket #21cv4099, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature

Carole Ludwig

Date: May 24, 2022